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No. 91-1863

In the Supreme Court of the United States

OCTOBER TERM 1991

RAYMOND I. KLAGISS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY IN RESPONSE TO THE STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, pursuant to Supreme Court Rule 15.6, hereby submits his reply to the State's Brief in Opposition to Petition for Writ of Certiorari, filed on or about June 26, 1992. The brief for the State of Indiana makes misstatements which compel this reply.

The State, at page 7 of its opposition, suggests that in a videotaped statement petitioner admitted "that he in fact committed the charged offense." This is not true. In the videotape (State's Exhibit 29), petitioner denies causing his mother, the decedent, any harm or neglecting her. Petitioner never confessed to these charges and, in fact, vigorously denied them throughout the trial. The fact that the State would characterize the videotape as a "statement, that he in fact committed the charged offense" is an outrage and itself reflects the vagueness of the charge. The State does not point to any part of the videotape from which it argues evidence of guilt.

Clearly, petitioner stated that he did not harm his mother. The State apparently concludes that petitioner's allowing his mother, Mrs. Klagiss, to remain in her home rather than committing her to a nursing home was neglect. However, petitioner stated that he moved into his mother's home in order to care for her. The State

continues to press its vague argument of culpability, which is so opaque as to extinguish any attempt to defend against it. A conviction based upon such an unsupported claim clearly violates due process when the statute under which petitioner was convicted is measured against the void for vagueness doctrine.

The State also argues that petitioner's "neglect" was causing his mother to die of a broken neck. First, there is no credible evidence to support such a conclusion. Second, both counts of the indictment charged petitioner with breaking Mrs. Klagiss' neck. (*See* Petition for Writ of Certiorari, pp. A-16, A-17). Yet, the jury could not reach a verdict on Count One (reckless homicide) and convicted petitioner on Count Two (neglect of a dependent). This result is inconsistent. If petitioner could not be found to have broken her neck under Count One, there is no reason he should be found to have broken her neck under Count Two. It is inconceivable that the jury could not reach a verdict on Count One, but could on Count Two, unless it applied the vague catchall of the neglect statute and its underlying instruction. It becomes clear that the prosecution could not make a case for homicide so it used the vagueness of the neglect statute to convict petitioner.

The fact that the jury could not reach a verdict on reckless homicide but could reach a verdict on the vague charge of neglect, after both counts charged petitioner with breaking his mother's neck, renders obvious the use a prosecutor can make of a vague statute. Petitioner may have thought that he was defending against a charge of breaking his mother's neck, when in fact he was defending against a nebulous, smorgasbord of facts coupled with a vague statute. This inability to determine what was charged and to prepare an adequate defense goes to the heart of due process. *Baggett v. Bullitt*, 377 U.S. 360 (1964). *See also Smith v. Goguen*, 415 U.S. 566 (1974).

What is also strange about this case is that Count Two for neglect carries a heavier penalty than does Count One for reckless homicide. Reckless homicide[1] carries a maximum penalty, as a Class C felony, of four years, Ind. Code § 35-50-2-6, whereas neglect carries a maximum penalty of ten years as a Class B felony. Ind. Code § 35-50-2-5. Petitioner was convicted on the more serious charge, whereas there was a hung jury on the lesser charge.

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[1]The State subsequently dismissed the reckless homicide count.

The jury was not informed of the different penalties involved. Homicide is not as serious under Indiana law as neglect. But who is to know what neglect includes? The reckless homicide statute, Ind. Code § 35-42-1-5, is a specific statute that requires proof of a reckless killing. The neglect statute, Ind. Code § 35-46-1-4, is a broad and vague catchall. The fact that the jury was hung on the statute requiring a specific charge and convicted petitioner on the vague statute reflects a denial of due process and cries out for review by this Court.

The State misses the point on the jury instruction. (*See* Petition, pp. A-18, A-19). It is not that the instruction is erroneous. It is that an instruction may, in some circumstances, clarify a vague statute so that the jury is not given discretion to find guilt in whatever it chooses. In this instance, a defendant is faced with a vague statute and an instruction that merely parallels it. This is a denial of due process.

The reliance by the State on *Taylor v. Kentucky*, 436 U.S. 478 (1978), is curious since that case supports petitioner. This Court in *Taylor* reversed a conviction on due process grounds because of the inadequacy of the trial court's instructions. In *Taylor*, the trial court's instructions were skeletal. The mere instructions on "proof beyond a reasonable doubt" were not enough. The *Taylor* decision gives greater reason for this Court to grant review in this case.

Reliance by the State on *Grayned v. City of Rockford*, 408 U.S. 104 (1972), similarly provides it with little comfort. That case dealt with an anti-noise ordinance near a school. This Court upheld the ordinance because it was written specifically for school areas. The Court looked to the preamble of the statute for clarification. In the case at bar, such clarification is absent. This is apparent when the history of the statute is reviewed. (*See* Petition, pp. A-21 to A-25). The statute was originally written for neglect of children, but was broadened without the sharp delineation required to give adequate notice of prohibited conduct. The statute was also originally classified as a Class D felony[2] until amended in 1981 to add a Class B designation. The neglect statute lacks any clarification to support a claim of constitutionality.

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[2]A Class D felony in Indiana carries a maximum sentence of one and one-half years. Ind. Code § 35-50-2-7.

The misstatements by the State are alone enough to warrant review by this Court. However, even the scant authority relied upon by the State does not adequately rebut the merits of the petition. The State has not satisfactorily set forth why petitioner's conviction should not be reviewed.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court issue a writ of *certiorari* to the Supreme Court of Indiana.

Respectfully submitted,

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